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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 36

JOSEPH K. WILLING, RECEIVER OF COMMERCIAL NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA,

Petitioner,

vs.

ISRAEL BINENSTOCK, INDIVIDUALLY AND AS SURVIVING PARTNER OF THE PARTNERSHIP FIRM OF SWINGER AND BINENSTOCK, AND BESSIE SWINGER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF BENJAMIN SWINGER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOSEPH A. C. GIRONE, JR.,
THOMAS J. MINNICK, JR.,
1106 City Centre Bldg., Philadelphia;
JAMES M. KANE,
Washington, D. C.,
Attorneys for Petitioner.

GEORGE P. BARSE,
Washington, D. C.,
Attorney for the Comptroller of the Currency,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No.

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania,

Petitioner,

vs.

ISRAEL BINENSTOCK, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, and BESSIE SWINGER, Individually and as Executrix of the Estate of Benjamin Swinger, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph K. Willing, as Receiver of the Commercial National Bank of Philadelphia, Pennsylvania, by direction of the Comptroller of the Currency of the

United States, respectfully submits this petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit (R. 26, 27) affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania, in the above cause (R. 11-14).

Summary Statement of Matters Involved.

The opinion (R. 26, 27, reported in 88 F. (2d), at 474) and decree (R. 28) of the United States Circuit Court of Appeals for the Third Circuit affirms the opinion (R. 11-14, reported in 18 Fed. Supp., at 262) and final decree (R. 17, 18) of the District Court of the United States for the Eastern District of Pennsylvania. The essential facts are:

On March 1, 1933, but as of the close of business on February 28, 1933, the Commercial National Bank of Philadelphia, Pennsylvania, (referred to hereinafter as the bank) failed (R. 3, 17) whereupon the Comptroller of the Currency assumed control of its business and assets (R. 3, 4, 17). On February 28, 1933, Benjamin Swinger and Israel Binenstock, partners doing business under the firm name of Swinger and Binenstock (referred to hereinafter as the firm) were indebted to the said bank on the following obligations, previously incurred, which were among the assets of the said bank as of the date of its failure:

Two joint notes for $10,000 each, executed and delivered to the bank by the firm (R. 4, 7, 8, 16)	$20,000.00
One joint note for $2604.10 executed and delivered to the bank by the firm to guarantee certain indebtedness of Salz Grocery Company, which note had been reduced by payments made up to the date of the filing of this suit to a balance of (R. 4, 8, 16)	37.98

One note, payable March 25, 1933, executed and delivered by Luciano Cammarota, as maker, to the firm which note was subsequently endorsed by the firm and discounted by the bank (R. 5, 9, 16) in the principal sum of 300.00

Benjamin Swinger, one of the members of the firm, died on February 28, 1933 (R. 3, 17). Thereafter the partnership business of the said firm was conducted by Israel Binenstock, the surviving partner, and Bessie Swinger, the widow and the sole beneficiary and executrix of the estate of Benjamin Swinger, Deceased (R. 3, 17).

At the close of business on February 28, 1933, the following deposit accounts were among the liabilities of the said bank:

Swinger and Binenstock, $5,822.52; Benjamin Swinger, $1,546.58; Israel Binenstock, $32,323.76 (R. 5, 16).

Petitioner credited by way of set-off one of the firm notes aforesaid with the sum of $5,822.52, *i. e.*, the balance of the firm's deposit account as of February 28, 1933 (R. 5, 16).

Respondents (Israel Binenstock, individually and as surviving partner of the partnership firm of Swinger and Binenstock, and Bessie Swinger, individually and as executrix of the estate of Benjamin Swinger, deceased) filed a bill in equity on July 12, 1935 (R. 3-9) against petitioner, as receiver, for the allowance of a set-off of the firm obligations (both as maker and as endorser) to the bank against (1) the individual deposit account of Benjamin Swinger; and (2) against so much of the individual deposit account of Israel Binenstock as may be necessary to cancel the balance of said firm indebtedness.

The questions presented to the District Court were:

(1) Whether the *individual* deposit balances of the members of the firm can be properly set-off against the

primary *joint* obligation of the firm to the insolvent national bank;

(2) whether the *individual* deposit balances of the members of the partnership may be set-off against the *joint endorsement* liability of the firm to the insolvent national bank.

Petitioner contended that the laws of the United States governed the right of set-off as applied to insolvent national banks and that, under the Federal law, separate claims can not be set-off against joint (partnership) obligations due and owing to an insolvent national bank.

The District Court denied petitioner's motion to dismiss (R. 14) and after hearing on bill and answer decreed that petitioner set-off the firm obligations as prayed for by respondents (R. 18). The District Court also ordered petitioner to allow a claim in favor of respondent Binenstock in the amount of $19,354.88, being the amount of his deposit account after making provision for the set-off as directed (R. 18).

The Circuit Court of Appeals affirmed the decision of the District Court (R. 26-28). The basis of the decision of both courts below was that "Since the question is balanced with doubt," the law of the state of Pennsylvania should be followed by the Federal Court sitting in Pennsylvania "for the sake of harmony and to avoid confusion".

Petitioner contends that the questions here presented are not balanced with doubt, and, secondly, that whether or not such questions are balanced with doubt, they are to be controlled by the uniform Federal rule as applied to insolvent national banks (as distinguished from the variable and irreconcilable rules of the several states), all of which will be discussed more fully hereinafter.

Opinions of the Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania appears at pages 11 to 14, inclusive, of the Record, and is reported in 18 Fed. Supp. at 262. The opinion of the Circuit Court of Appeals for the Third Circuit affirming the decision of the District Court appears at pages 26 and 27 of the Record and is reported in 88 F. (2d) at 474.

Jurisdiction.

The Decree of the Circuit Court of Appeals for the Third Circuit, which is sought to be reviewed, was entered on February 2, 1937 (R. 28).

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 1 (U. S. C. Title 28, Section 347(a)).

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Third Circuit erred:

1. In allowing respondents (partners) to set-off their respective individual deposit accounts in the insolvent national bank against the joint primary obligations of the partnership to the bank.

2. In allowing respondents (partners) to set-off their respective individual deposit accounts in the insolvent national bank against the joint secondary liability (as indorsers) of the partnership to the bank.

3. In deciding that the right of individual members of a partnership to set-off their individual deposit accounts in an insolvent national bank against their joint obligations (both as makers and endorsers) to such bank is a question balanced with doubt.

4. In deciding that the law of set-off as applied to insolvent national banks is governed by the State rule.

5. In not dismissing respondents' bill in equity.

Statutes Involved.

Section 5236 U. S. R. S. (U. S. C. Title 12, Sec. 194) provides:

> "*Dividends on adjusted claims; distribution of assets.*—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Section 5242 U. S. R. S. (U. S. C. Title 12, Sec. 91) provides:

> "*Transfers by bank and other acts in contemplation of insolvency.*—All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one

creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

Purdon's Pa. Stat. Ann., Title 59, Sec. 37 (Uniform Partnership Act, Sec. 15) provides in part:

"*Nature of partner's liability.*—All partners are liable—

* * * * * * *

(b) Jointly, for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

Purdon's Pa. Stat. Ann., Title 59, Sec. 102 (Uniform Partnership Act, Sec. 40) provides in part:

"*Rules for distribution.*—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are—

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank, in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied, in order of their declaration in clause (a) of this paragraph, to the satisfaction of the liabilities."

Questions Presented and Reasons for Allowance of Writ of Certiorari.

The Circuit Court of Appeals, in affirming the decision of the District Court in this case, has decided (erroneously, we believe) three important questions, each of which will be discussed under the following subheadings:

1. *In deciding a question of set-off as applied to insolvent national banks, should the courts follow the established rules of the Federal courts, or should they follow the widely varying and conflicting rules of set-off prevailing in the several states?*

(a) *This precise question of Federal law* (which is constantly arising in the administration of the affairs of national banks in receivership) *has not been, but should be settled by this Court* in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks, may apply with uniformity the correct rules concerning the allowance of set-off in insolvent national banks in the several states.

The law of *set-off as applied to national banks in receivership is a matter of substance, not a matter of procedure, Shannon* v. *Sutherland,* 74 F. (2d) 530; *Wisdom* v. *Guess Dry Cleaning Company,* 5 Fed. Supp. 762. See also *The Gloria,* 286 Fed. 188, 192, 193; *Champlin Refining Company* v. *Gasoline Products Company,* 29 F. (2d) 331, 338, affirmed *United States* v. *Thekla,* 266 U. S. 328. The reason underlying the doctrine that set-off as applied to insolvent national banks is a matter of substance, is that the determination of the question must be made in the light of the National Banking Act, *Bromley Shepard Co., Inc., et al.*

v. *Roelker*, 8 Fed. Supp. 215, affirmed 73 F. (2d) 618, cert. denied 294 U. S. 713.

The Conformity Act (Sec. 914, U. S. R. S., Title 28 U. S. C. Sec. 724) does not apply to this type of case for the reason stated in the foregoing paragraph, and for the additional reason that this case arises in equity and not at law.

The right of the respondents to participate in the distribution of the assets of the insolvent national bank is determined and fixed by the National Banking Act; consequently the question of whether that right may be enforced by way of set-off or otherwise must be determined by the Federal rule, cf., *Planters National Bank* v. *Wysong*, 177 N. C. 380, 99 S. E. 199, 12 A. L. R. 1412 (citing *Barnet* v. *Muncie National Bank*, 98 U. S. 555), cert. denied 250 U. S. 665 and error dismissed 251 U. S. 665.

Since *set-off*, insofar as it relates to insolvent national banks *is a question of general law, the Federal courts will exercise their own independent judgment in deciding the controversy. Gray* v. *Rollo*, 18 Wall. 629; *Swift* v. *Tyson*, 16 Pet. 1; *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518. It is worthy of note that the respondents stated in their bill of complaint that

> "This is an action in equity arising under the laws of the United States" (R. 4).

(b) The decision of the Circuit Court of Appeals on this question is in *direct conflict with applicable principles established and consistently followed by this Court.* Mr. Justice Field, in expressing the views of this Court on the National Banking Act, said in *Cook County National Bank* v. *United States*, 107 U. S. 445, 448:

> "Everything essential to the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither

> limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents nor their estates."

The National Banking Act is not affected by state statutes or decisions in conflict therewith, *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Jennings* v. *United States Fidelity and Guaranty Co.* 294 U. S. 216.

Where mutuality in quality of right does not exist, this Court has denied set-off even though under the state statutes set-off might be available, *Dakin* v. *Bayly*, 290 U. S. 143, 90 A. L. R. 999. The Pennsylvania rule permitting set-off of non-mutual claims (*i. e.*, joint debt against several demands) was expressly rejected by this Court in *Gray* v. *Rollo, supra*, wherein Mr. Justice Bradley said at page 632:

> "But we do not regard the rule adopted in Pennsylvania as in accord with general rules of equity which govern cases of set-off."

The National Banking Act must be construed so as to operate uniformly throughout the states, *First National Bank of San Jose* v. *California*, 262 U. S. 366.

To permit the decision in this case to stand would result in confusion and uncertainty in attempting to apply the inconsistent rules of the several states.

(c) *The decision of the Circuit Court of Appeals on this question is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit* in *First National Bank* v. *Seldon*, 120 Fed. 212, wherein the court aptly said at page 215:

> "The moment the Niles bank went into the hands of the receiver, the federal law became the law of the distribution of its assets. In no other way could there be unity of administration, and a carrying out of the federal mandate of equality."

See also *McCandless* v. *Dyar* (D. C. S. D), 34 F. (2d) 989, wherein the court said:

> "The right to the allowance of such an offset in the case at bar must be determined in the light of the statutes of the United States controlling suspended banks in the hands of a receiver appointed by the Comptroller of the Currency, and especially the provisions of the United States statutes prohibiting preferences in the liquidation of national banks."

2. *Is a member of a partnership entitled to set-off his individual deposit account in an insolvent national bank against the joint primary obligations of the partnership to the bank?*

(a) *This precise question of Federal law*—frequently arising in the administration of the affairs of insolvent national banks—*has not been, but should be settled by this Court* in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks, may apply with uniformity the correct rules concerning the allowance of set-off in such cases.

(b) The decision of the Circuit Court of Appeals on this question seems to be in conflict with the applicable principles consistently followed by this Court requiring: mutuality of *parties*—*Young* v. *Black*, 7 Cranch 564; *Beauregard* v. *Case*, 91 U. S. 134; mutuality of *right*—*Gray* v. *Rollo*, 18 Wall. 629; and mutuality in *quality of right*—*Sawyer* v. *Hoag*, 17 Wall. 610; *Scammon* v. *Kimball*, 92 U. S. 362; *Drexel* v. *Berney*, 122 U. S. 241.

In each of the above mentioned decisions, this Court laid down the fundamental doctrine that courts of equity, following the law, will not permit the set-off of a joint debt against a separate claim, or conversely of a separate debt against a joint claim, because such debts accrue in different rights, and consequently lack the required mutuality.

While insolvency is recognized as a ground for equitable intervention, yet courts of equity will not allow set-off *unless there are other equitable grounds—Scott* v. *Armstrong,* 146 U. S. 499; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.,* 152 U. S. 596; *a fortiori,* insolvency alone will not be permitted to destroy the statutory mandate (Secs. 5236 and 5242, U. S. R. S. quoted in full *supra,* pp. 7, 8) of the National Banking Act requiring equality of distribution—*Cook County National Bank* v. *United States,* 107 U. S. 445—nor to give a preference contrary to the statute—*Hanover National Bank* v. *Suddath,* 215 U. S. 122.

(c) *The decision of the Circuit Court of Appeals for the Third Circuit on this question is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit* in *Shannon* v. *Sutherland, supra,* wherein it was held that set-off as applied to insolvent national banks is a matter of substance, rather than procedure, and the obligor (who was not only jointly but also severally liable) was not permitted to set-off against his deposit account more than his proportionate share of his primary joint and several liability. The decision in the instant case is also in conflict with a previous decision of the same court in *Gray* v. *School District,* 67 F. (2d) 141, cert. denied *Hustead* v. *School District,* 291 U. S. 660, wherein the court said at pages 142-3:

> "The law will not permit a person to pay his debt with money of another."

We have found no decision by any Federal court permitting set-off of a joint partnership debt (as distinguished from several or joint and several) against a claim held by an individual partner, regardless of whether the partnership creditor was solvent or insolvent. The Circuit Court

of Appeals, in deciding this case, cited the decision of the Circuit Court of Appeals for the First Circuit in *Bromley Shepard Co.* v. *Roelker, supra,* which is clearly distinguishable from the instant case because (1) the debt to the bank was not a partnership debt; (2) Mrs. Shepard was an accommodation maker, and in equity the Bromley Shepard Company was the real and ultimate obligor. It is also significant to observe that while both joint makers in that case sought to have their respective deposit accounts set-off yet the Circuit Court of Appeals for the First Circuit permitted only the deposit account of the Bromley Shepard Company to be set off. To have permitted the set-off against Mrs. Shepard's account would have enabled her to recover from the company, thereby obtaining indirectly a preference over other depositors and creditors of the bank.

(d) That the debts of the partnership in the instant case are joint (as distinguished from several or joint and several) was correctly decided by the courts below and is clearly settled by the provisions of Title 59, Purdon's Pa. Stat. Ann. Sec. 37 (Sec. 15 of the Uniform Partnership Act, quoted in part, *supra*, p. 7). *The Circuit Court of Appeals has decided this question in a way probably untenable and in conflict with the weight of authority—Beauregard* v. *Case, supra; Gray* v. *Rollo, supra; Shannon* v. *Sutherland, supra,* and *In re Schults et al.* (D. C. N. Y.), 132 Fed. 573 (involving precisely the same question here under consideration). In general, the rule of set-off in bankruptcy is the rule in equity, *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 166. See also *Williams* v. *Thomas* (D. C. Mich.), 6 F. Supp. 1011, at pp. 1014, 1015.

It is believed the proper doctrine on this question of general law was announced by the Indiana Court in the case

of *Wolcott* v. *Pierre,* 100 Ind. App. 16, 188 N. E. 596, 597, where the court said:

> "Appellee contends that he is not relying upon a statutory set-off under section 371, Burns' Ann. St. 1926, but seeks an equitable set-off 'because of the fact that appellant was insolvent, and therefore appellee and his partner had no way of enforcing their demand against appellant at law.' The courts of Indiana have long recognized the doctrine of equitable set-off; and, while the general rule is that only mutual debts existing in the same right are proper matters of set-off, still this rule has exceptions, one of them being that whenever it is necessary to prevent irremediable injustice, equity will allow the set-off although the debts are not mutual. Watson's Works Practice, sec. 715, p. 511. Appellee cites to this proposition two cases from Indiana, Eigenmann, et al. v. Clark, et al. (1898), 21 Ind. App. 129, 51 N. E. 725; Sefton v. Hargett, et al. (1888), 113 Ind. 592, 15 N. E. 513. The rule announced in both of these cases cited by appellee is to the effect that a court of equity will sometimes allow a set-off in the absence of strict mutuality, in order to prevent irremediable injustice.
>
> "Appellant concedes this rule, saying that it is 'too well settled for debate. But they do not decide what, in every instance, is irremediable injustice; they do not decide what nor where the equity would be if there were other creditors equally entitled to share in the distribution of the insolvent's estate.'
>
> "So, the question here is: Is the enforcement of the set-off herein necessary to prevent irremediable injustice?
>
> "Appellee bases right to this set-off upon the fact of the insolvency of the bank and the consent of his partner that the joint deposit may be used for this purpose, and that to disallow the set-off would work an irremediable injustice to appellee; and cites several cases from outside jurisdictions upon this proposition among them some from the state of Pennsyl-

vania, which has gone further in the allowing of set-offs than most of the other states in this country. In the case of Gray v. Rollo, (1873) 18 Wall. 629, 632, 21 L. Ed. 927, the Supreme Court of the United States, speaking of the Pennsylvania rule, said: 'In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off.' We do not think that the Pennsylvania rule, which allows set-offs without regard to mutuality, should be followed in this state."

(e) To permit the partnership debt to be retired by set-off against the individual deposit accounts of the members would enable the members to share in the partnership assets which constitute a trust fund dedicated to the payment of the partnership debts to partnership creditors, including the bank. See Title 59, Purdon's Pa. Stat. Ann., Sec. 102 (Sec. 40 of Uniform Partnership Act quoted in part, *supra*, pp. 7, 8). See also *Murrill* v. *Neill*, 8 How. 414, 427; *Froess* v. *Froess*, 284 Pa. 369, 131 A. 276. Respondent Binenstock, by using a large portion of his deposit account to extinguish the balance of the partnership debt would also be entitled to contribution from the estate of the deceased partner, clearly obtaining an advantage not enjoyed by other depositors of the bank. This unequal result, although indirectly made available, would violate the spirit if not the letter of Secs. 5236 and 5242, U. S. R. S. U. S. C. Title 12, Secs. 91 and 194 quoted in full *supra*, pp. 6, 7), requiring ratable distribution to all creditors with preferences to none, cf. *Jewett* v. *Martinsville Milling Co.* (C. C. A. 7), 76 F. (2d) 153.

3. *Can the members of a partnership maintain a suit against a national bank receiver to compel set-off of*

their respective individual deposit accounts in the bank against the joint secondary liability (as indorsers) of the partnership to the bank?

(a) This, like the second question, is an important question of Federal law which has not been, but should be settled by this Court for the same reason assigned to the second question, (*supra,* p. 11; par. (a))

(b) The decision of the Circuit Court of Appeals on this question seems to conflict with the decision of this Court in *Beauregard* v. *Case, supra,* wherein Mr. Justice Field said:

> "If there was any liability on the part of May for the indebtedness of the firm, except as partner, it was a liability as surety; and there can be no compensation, by operation of law, between the demand of the bank against him as surety and the indebtedness of the bank to him personally."

(c) The decision of the Circuit Court of Appeals on this question is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Shannon* v. *Sutherland, supra,* and in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Spurway* v. *Weintraub,* 66 F. (2d) 69, on the same matter. In the last mentioned case, the court held that in an indorser's suit against an insolvent national bank to compel set-off of his deposit against his liability as the indorser, the plaintiff has the burden of proving with reasonable certainty that the makers are insolvent, because if the set-off were allowed, the indorser could then collect from the makers and thereby obtain a greater percentage of his deposit than could other depositors. See also *Bryant* v. *Williams* (D. C. N. C.), 16 F. (2d) 159, wherein Circuit Judge Parker refused to permit an indorser who had discounted certain notes to set-off his deposit against the notes.

(d) The Circuit Court of Appeals has decided this important question in a way untenable and in conflict with the weight of authority. See *Bank of United States* v. *Braveman*, 259 N. Y. 65, 181 N. E. 50, 82 A. L. R. 658, and annotation at pp. 670 *et seq.*; *In re Garfunkel* (D. C. N. Y.), 8 F. (2d) 790; *Knaffle* v. *Knoxville Banking & Trust Co.*, 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167 (cited with approval in *Shannon* v. *Sutherland, supra*), and *Williams* v. *Thomas, supra*, wherein an accommodation indorser who, with other accommodation indorsers, was jointly liable upon a note held by a receiver of a national bank, was denied the right to set-off such joint liability against his individual deposit in the bank even though the maker was insolvent.

WHEREFORE your petitioner respectfully prays:

(1) That this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above case be granted;

(2) That the decision of the Circuit Court of Appeals for the Third Circuit in the above case be reversed; and

(3) For such other and further relief in the premises as to this Honorable Court may seem proper.

Respectfully submitted,

JOSEPH A. C. GIRONE, JR.,
THOMAS J. MINNICK, JR.,
JAMES M. KANE,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for the
Comptroller of the Currency,
Of Counsel.

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